offered specific evidence from the *Buckley* record to demonstrate that the time-protection issue was also "fully before the Court in *Buckley*" and therefore had been rejected as a basis for imposing expenditure limits. Pet. App. 258a, 265a. Finally, Judge Winter objected to the narrow-tailoring remand because "vastly less restrictive alternatives"—including a system of combined public and private campaign funding—"are so obvious that a remand is unnecessary." Pet. App. 292a, 300a.

Plaintiffs petitioned for rehearing en banc, which the Second Circuit denied. *See Landell v. Sorrell*, 406 F.3d 159, 160 (2d Cir. 2005). The denial prompted four separate dissenting opinions, which were joined by a total of five judges. *Id.*[4] Three concurrences in the denial of rehearing en banc were also filed. *Id.* Notably, three of the seven judges concurring in the denial acknowledged that Act 64 is in tension with this Court's existing campaign finance precedent. *See id.* at 165, 167 (Sack and Katzmann, JJ., concurring in the denial of rehearing en banc); *id.* at 164 (Calabresi, J., concurring in the denial of rehearing en banc). Indeed, Judge Calabresi candidly acknowledged a desire to encourage this Court to revisit its holding in *Buckley* that an interest in equalizing electoral spending is not a sufficient basis for expenditure limits. *See id.* at 162, 165 (Calabresi, J., concurring in the denial of rehearing en banc) ("*Buckley*, by fiat, declared the state's explicit recognition and amelioration of wealth distribution problems in the electoral marketplace to be an insufficiently compelling interest to pass constitutional muster. . . . I believe . . . a reconsideration [of *Buckley*] to be essential.").

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[4] Because Petitioners' Appendix was produced before the final amended version of the order denying rehearing en banc was filed, it does not contain Judge Calabresi's opinion concurring in the denial of rehearing or Judge Raggi's opinion dissenting from the denial. Pet. App. 317a.

SUMMARY OF ARGUMENT

Free speech is the essence of self-government, and thus all restrictions on political speech must be subject to searching judicial scrutiny. Act 64's expenditure and contribution limits silence the speech of both voters and candidates, and therefore cannot be reconciled with *Buckley* or with the First Amendment principles on which that decision rests.

The Second Circuit's conclusion that the anticorruption and time-protection interests taken together are sufficient to support Act 64's expenditure limits flatly contradicts *Buckley*'s holding. Indeed, Vermont's alleged time-protection problem is caused by its exceedingly low contribution limits, which require candidates to approach numerous small donors to raise essential campaign funds. Because Vermont's campaign finance restrictions have generated its perceived time-protection problem, the State cannot rely upon its interest in remedying that problem to justify its expenditures limits. Moreover, as in *Buckley*, Act 64's contribution limits and disclosure provisions more than fully address any legitimate anticorruption interest Vermont may have.

In upholding Act 64's expenditure limits, the Second Circuit *sub silentio* broadened the anticorruption interest to encompass the "equalization" rationale explicitly rejected in *Buckley*. This Court should reaffirm this aspect of *Buckley* because the compelled equalization of political speech is inconsistent with the First Amendment's fundamental commitment to free and robust debate on public issues. Whereas the First Amendment promotes a competitive and uninhibited marketplace of political ideas, Act 64 subordinates this principle in favor of a vague effort to equalize the quantity of political speech among various groups.

Furthermore, Vermont's campaign finance laws embody incumbent self-protection. Act 64 cannot withstand close judicial scrutiny because it accomplishes very little of what it claims and has the principal effect of benefiting incumbents.

For example, contrary to Vermont's assumption that Act 64's contribution limits reduce the access and influence of large donors, the Act actually has the opposite effect. The most efficient way to raise funds under the Act is for candidates to pursue only those donors willing to give the maximum authorized contribution, and thus to quickly reach the low expenditure limits, which marginalizes the majority of Vermont contributors.

Ultimately, Act 64's expenditure limits, contribution limits, and related-expenditure provision are incompatible with the fundamental political freedoms guaranteed by the First Amendment, and should be invalidated in their entirety.

ARGUMENT

I. ACT 64 IS BARRED BY THIS COURT'S HOLDING IN *BUCKLEY*.

The First Amendment embodies this Court's "profound national commitment to the free exchange of ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). Nowhere is this commitment stronger than in the realm of political speech, which constitutes "the core of the First Amendment." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982). *Buckley* therefore cautioned that it "is wholly foreign to the First Amendment" to "restrict the speech of some elements of our society in order to enhance the relative voice of others." 424 U.S. at 48-49. Act 64's expenditure and contribution limits are squarely barred by *Buckley*'s admonition.

A. Act 64 Is Premised Upon Inappropriate Governmental Interests.

1. In *Buckley*, this Court considered a First Amendment challenge to provisions of the Federal Election Campaign Act ("FECA") that imposed unprecedented limitations on political contributions and expenditures. Pub. L. No. 93-443, 88 Stat. 1263 (1974) (codified in scattered sections of 2, 5, 18, 26, 47 U.S.C.). FECA prohibited individual campaign con-

tributions in excess of $1,000 per candidate and $25,000 overall, barred individuals from independently spending more than $1,000 on behalf of a candidate, and restricted the total amount a candidate could spend in primary and general election campaigns. *Buckley*, 424 U.S. at 7.

The United States asserted three governmental interests in support of FECA's campaign restrictions. *Buckley*, 424 U.S. at 25. The "primary interest" was "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions." *Id.* The Court termed the other two interests "'ancillary' interests." *Id.* The first of these interests was "equalizing the relative ability of all citizens to affect the outcome of elections" by "mut[ing] the voices of affluent persons and groups in the election process." *Id.* at 25-26. The second was to "open the political system more widely to candidates without access to sources of large amounts of money" by curtailing the supposed "skyrocketing cost of political campaigns." *Id.* at 26.

The *Buckley* Court closely scrutinized FECA's campaign finance restrictions because the "governmental interests advanced in support of the Act involve[d] 'suppressing communication'" by "restricting the voices of people and interest groups who have money to spend and reducing the overall scope of federal election campaigns." 424 U.S. at 17. Although the Court upheld FECA's $1,000 limitation on campaign contributions by individuals, it was careful to explain that it was not "address[ing] the more serious argument that these [contribution] limitations, in combination with the limitation on expenditures . . . invidiously discriminate against major-party challengers and minor-party candidates." *Id.* at 31 n.33. The Court expressed concern that "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge." *Id.* The Court further warned that "contribution restrictions could have a severe impact on political dialogue if

the limitations prevented candidates and political committees from amassing the resources necessary for effective advocacy." *Id.* at 21.

Turning to FECA's expenditure limits, the Court noted that such restrictions "impose direct and substantial restraints on the quantity of political speech" and "cannot be sustained simply by invoking the interest in maximizing the effectiveness of the less intrusive contribution limitations." *Buckley*, 424 U.S. at 39, 44. The Court determined that the anticorruption interest was "inadequate" to justify the Act's $1,000 limitation on independent campaign expenditures because "the independent advocacy restricted by the provision does not presently appear to pose dangers of real or apparent corruption comparable to those identified with large campaign contributions." *Id.* at 45-46. The Court then considered whether the "ancillary governmental interest in equalizing the relative ability of individuals and groups to influence the outcome of elections" supported the $1,000 expenditure limit. *Id.* at 48. The Court squarely rejected this "equalization" rationale and emphasized that "*the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.*" *Id.* at 48-49 (emphasis added). The Court therefore concluded that FECA's $1,000 independent campaign expenditures limitation violated the First Amendment. *Id.* at 51.

The Court also invalidated FECA's limitations on candidates' overall campaign expenditures. The Court explained that the anticorruption interest was already "served by . . . contribution limitations and disclosure provisions" and that "[i]n the free society ordained by our Constitution it is not the government but the people . . . who must retain control over the quantity and range of debate on public issues in a political campaign." *Buckley*, 424 U.S. at 55, 57 (footnote omitted).

In the thirty years since *Buckley* was decided, this Court has held fast to the essential core of its holding, consistently evaluating campaign finance laws solely by their congruence with the government's anticorruption interest. *See, e.g., FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("preventing corruption or the appearance of corruption are the *only* legitimate and compelling government interests thus far identified for restricting campaign finances" (emphasis added)).

2. The Second Circuit relied upon Vermont's asserted anticorruption and time-protection interests to sustain Act 64's expenditure limitations. Pet. App. 144a. Analyzed in accordance with *Buckley*, however, the Second Circuit's attempt to bolster the anticorruption interest with Vermont's asserted time-protection interest collapses.

Vermont's time-protection interest is nothing more than a byproduct of its anticorruption interest. Indeed, if Vermont candidates do spend more than optimal amounts of time fundraising, then it is Act 64's low contribution limits that are to blame. Pet. App. 143a. In the absence of such stringent restrictions, candidates could raise necessary funds from a smaller number of donors. Because Vermont's purported time-protection problem is attributable to the contribution limits enacted in response to the State's anticorruption concerns, the time-protection interest cannot serve as an independent justification for restricting political speech.[5]

It defies logic and common sense to permit *Buckley*'s rejection of the anticorruption interest as a sufficient basis for expenditure limits to be circumvented through such legal

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[5] Instead of justifying even more speech restrictions, a time-protection problem actually indicates that contribution limits are set at unconstitutionally low levels. *See McConnell*, 540 U.S. at 135 (warning that contribution limits could be "so low as to 'preven[t] candidates . . . from amassing the resources necessary for effective advocacy'" (quoting *Buckley*, 424 U.S. at 21 (brackets in original))).

bootstrapping. *See* Pet. App. 331a (Walker, C.J., dissenting from the denial of rehearing en banc) ("Justifying a statute based on problems that the statute itself creates makes about as much sense as Baron von Munchausen's boast that he pulled himself out of a swamp by his own hair."). Vermont should not be permitted to rely upon its anticorruption interest to manufacture multiple derivative interests that, when aggregated, are ostensibly capable of supporting expenditure limits. *See* Pet. App. 336a (Jacobs, J., dissenting) ("[T]he more-restrictive expenditure limits have been enacted to mitigate the inevitable and predictable side-effects of the less-restrictive contribution limits. . . . Strict scrutiny does not tolerate such bootstrapping." (emphases omitted)).[6]

Moreover, to the extent that Act 64 actually reduces the time that candidates spend fundraising, it restricts constituents' access to their elected officials by limiting voters' opportunities to interact with candidates at fundraising events. Vermont's efforts to conserve candidates' time therefore constitute an impediment to voters' ability to meet and communicate with their elected officials.

B. The Court Should Reaffirm *Buckley*'s Rejection Of The "Equalization" Interest.

Act 64's expenditure and contribution limits make little sense when viewed as merely an attempt to prevent corruption or to conserve candidates' time. Indeed, these were not the only interests that the Act was designed to promote. The

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[6] As in *Buckley*, Vermont's anticorruption interest is more than sufficiently addressed by reasonable contribution limits combined with strict disclosure laws. *See* 424 U.S. at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [the Act's] campaign expenditure ceilings."). Indeed, Vermont presented "no evidence in the record that Act 64's new low limits on contributions alone will not suffice to eliminate any improper influence." Pet. App. 266a (Winter, J., dissenting).

Second Circuit recognized that when drafting Act 64, "Vermont lawmakers were concerned with more than just the *quid pro quo* corruption that preoccupies much campaign finance reform." Pet. App. 94a. In contravention of *Buckley*, Vermont lawmakers also sought to compel the equalization of political speech. *See, e.g.*, Pet. App. 130a (asserting that "[l]arge contributions and large expenditures . . . reduce public confidence in the electoral process" (quoting 1997 Vt. Laws P.A. 64 (H. 28) (finding No. 9))). Indeed, Vermont explicitly argued below that Act 64 "protect[s] equal access to political participation." Pet. App. 127a.

In upholding Act 64, the Second Circuit evaded *Buckley*'s rejection of the equalization rationale by *sub silentio* broadening the anticorruption interest to subsume the notion of equalization. *See, e.g.*, Pet. App. 133a (considering testimony that "not every voter has the financial ability to participate" as evidence of corruption). As Judge Winter correctly recognized, both Act 64 and the Second Circuit's opinion sustaining it are premised upon the theory "that less political advocacy is better for us as a polity because too much political activity is engaged in by powerful groups." Pet. App. 279a (Winter, J., dissenting). This governmental interest in "equalizing" political speech through controlling campaign costs and restricting candidates' financial resources is a rationale that *Buckley* expressly considered and rejected.

Cutting away at the edges of *Buckley*'s equali tion holding, under the guise of preventing "corruption," muddles the Court's constitutional jurisprudence and "trenches upon an area in which the importance of First Amendment protections is 'at its zenith.'" *Meyer*, 486 U.S. at 425 (citation omitted); *see also Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971) ("[I]t can hardly be doubted that the [First Amendment's] constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.").

Buckley's holding is a fundamental reflection of our "profound national commitment to the principle" that "debate on public issues should be uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). Indeed, the "right of freely examining public characters and measures, and of free communication among the people thereon, [is] the only effectual guardian of every other right." James Madison, Report on the Virginia Resolutions (1800), *reprinted in* 5 THE FOUNDERS' CONSTITUTION 146 (Philip B. Kurland & Ralph Lerner eds., 1987).

Vermont's expenditure limits operate on the assumption that "too much" political speech undermines citizen confidence in the government. The First Amendment, however, embodies the opposite premise. As Justice Breyer has recently explained:

> [A]ctive liberty is particularly at risk when law restricts speech directly related to the shaping of public opinion, for example, speech that takes place in areas related to politics and policy-making by elected officials. That special risk justifies especially strong pro-speech judicial presumptions. It also justifies careful review whenever the speech in question seeks to shape public opinion, particularly if that opinion in turn will affect the political process and the kind of society in which we live.

STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION 42 (2005). This principle has dominated our nation's understanding of political speech since its founding. *See* Madison, *supra*, at 145 ("The value and efficacy of [voting] depends on the knowledge of the comparative merits and demerits of the candidates for public trust, and on the equal freedom, consequently, of examining and discussing these merits and demerits of the candidates respectively.").

Because political speech rests at the First Amendment's core, the government cannot forcibly equalize political speech by suppressing one group's speech in favor of another's. As this Court recognized in *Buckley*:

> The First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive, or unwise. In the free society ordained by our Constitution *it is not the government but the people . . . who must retain control over the quantity and range of debate* on public issues in a political campaign.

424 U.S. at 57 (emphasis added; footnote omitted).

The "equalization" rationale upon which Act 64 was premised undermines the protection historically afforded to political speech and cannot be reconciled with the First Amendment's role as guardian of the political marketplace. *See Buckley*, 424 U.S. at 49 ("The First Amendment's protection against governmental abridgment of free expression cannot properly be made to depend on a person's financial ability to engage in public discussion."). Indeed, the First Amendment assumes a competitive marketplace of political ideas where "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Moreover, when the role of money is reduced, media access, fame or notoriety, and the advantages inherent in incumbency become even more dominant factors in deciding elections. *See* Bradley A. Smith, *Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform*, 105 YALE L.J. 1049, 1078 (1996) ("attempts to exclude a particular form of power—money—from politics only strengthen the position of those whose power comes from other, nonmonetary, sources"). In fact, money often permits a challenger to overcome an incumbent's inherent advan-

tages. *See Buckley*, 424 U.S. at 56-57 ("the equalization of permissible campaign expenditures might serve not to equalize the opportunities of all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign"). With expenditure limits in place, the already well-known, who can rely upon their preexisting name recognition, are often the only candidates able to mount an effective challenge to an incumbent. As Governor Schwarzenegger's electoral success in California suggests, publicly recognizable candidates may frequently enjoy a significant advantage over their opponents. When expenditure limits are implemented, the name recognition of challengers who are widely known to the electorate as war heroes, Hollywood movie stars, or superstar athletes gains even greater significance.

Similarly, by creating a system in which "free" media would be of potentially disproportionate significance, Vermont would ensure that free media's favored candidates have an unfair advantage. Vermont would bar a candidate from buying media access to counteract the unlimited sums that media corporations can spend to promote their favored candidate. *See* Mitch McConnell, *Why Are Media Exempt?*, USA TODAY, Mar. 19, 2002, at A14 (observing that "one page of speech in USA Today could cost a private citizen, group, or candidate about $100,000").

Recognizing compelled equalization of political speech as an interest that trumps the First Amendment's protections opens the door to speech regulation that logically extends well beyond expenditure limits. *See* Mitch McConnell, *Speech Limits Are Not Reform*, USA TODAY, Feb. 26, 2002, at A13. This may not disturb some advocates of campaign finance reform; one of Vermont's defense witnesses testified at trial that the "government ought to regulate political speech the way that it regulates public utilities." Pet. App. 195a (Winter, J., dissenting). Indeed, if the "equalization" rationale is to be effectuated, the government *must* regulate politi-

cal speech the way that it regulates public utilities. Equalization of political speech can only be achieved—to the extent that it can be achieved at all—through extensive regulation and direct governmental interference clearly inconsonant with the core principles underlying the First Amendment. This Court should therefore invalidate Vermont's effort to use expenditure and contribution limits to compel the equalization of political speech.

II. ACT 64 IS AN UNCONSTITUTIONAL IMPEDIMENT TO THE ELECTORAL PROCESS.

Because campaign finance restrictions present a unique potential for incumbent entrenchment, "considerable judicial suspicion" of such laws is appropriate. Cass R. Sunstein, *Political Equality and Unintended Consequences*, 94 COLUM. L. REV. 1390, 1400 (1994). Act 64's primary effect is to insulate incumbents from effective electoral challenges, and it therefore cannot withstand judicial scrutiny.

A. Act 64's Contribution And Expenditure Limits Entrench Incumbents.

1. Incumbents have a direct, personal stake in the election laws that they enact. *See* Sunstein, *supra*, at 1400 ("Any system of campaign finance limits raises the special spectre of governmental efforts to promote the interests of existing legislators."). It is difficult to conceive of any other area of law where the self-interest of all legislators, regardless of their party affiliation, is so uniformly aligned and so inconsistent with their constituents' interests. *See id.* ("Congressional support for [campaign finance] limits is especially likely to reflect congressional self-dealing. . . . Indeed, it is hard to imagine other kinds of legislation posing similarly severe risks.").

Recognizing this, courts closely review campaign finance legislation to ensure that First Amendment principles

are not being subordinated to legislators' own interests. *See Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 402 (2000) (Breyer, J., concurring) (noting that the Court "defers to empirical legislative judgments" only where "that deference does not risk such constitutional evils as, say, permitting incumbents to insulate themselves from effective electoral challenge"). This is especially true when legislators justify such laws on the basis of "equalizing" political speech; such a rationale is simply too far-reaching and amorphous to provide any meaningful restraint on naturally self-interested legislators. David A. Strauss, *Corruption, Equality, and Campaign Finance Reform*, 94 COLUM. L. REV. 1369, 1386 (1994) ("[S]imply turning Congress loose to promote 'equality,' without providing a reasonably precise definition of what equality is, could just lead to measures that give even more protection to political incumbents or other favored interests. In fact it would be a little surprising if it did not lead to such a result."). As Justice Breyer has explained:

> [C]ourts should not defer when they evaluate the risk that reform legislation will defeat the participatory self-government objective itself. That risk is present, for example, when laws set contribution limits so low that they elevate the reputation-related or media-related advantages of incumbency to the point of insulating incumbent officeholders from effective challenge.

BREYER, *supra*, at 49.

The risk of incumbent self-dealing reinforces the importance of subjecting expenditure limits to the "exacting scrutiny applicable to limitations on core First Amendment rights of political expression." *Buckley*, 424 U.S. at 44-45. The Second Circuit, however, reviewed Act 64 with unwarranted deference, contending that the "review of legislation should not amount to a presumption against the fairness of spending limits simply because elected officials have an interest in the

reforms they are enacting." Pet. App. 151a; *see also* Pet. App. 207a (Winter, J., dissenting) ("I respectfully submit that my colleagues have not given this legislation careful, much less exacting, scrutiny.").

2. Even assuming, *arguendo*, that Act 64's stated objectives are constitutionally legitimate, the Act does not accomplish its purported ends. Its expenditure limits, for example, do not further Vermont's anticorruption interest. *See Buckley*, 424 U.S. at 55 ("The interest in alleviating the corrupting influence of large contributions is served by the Act's contribution limitations and disclosure provisions rather than by [its] campaign expenditure ceilings."). Nor does Act 64 ameliorate the time-protection problem it purports to address. Indeed, even the district court acknowledged as much. *See* Pet. App. 57a (noting that as a consequence of Act 64's low contribution limits, fundraising "will take more time and energy"). Similarly, Act 64's contribution limits are too low to correspond to any threat of actual or apparent corruption.

Act 64 is particularly effective, however, at promoting incumbency protection. This was obvious to the judges who dissented from the denial of rehearing en banc because they did not view Act 64 through the panel majority's deferential lens. Pet. App. 331a (Walker, C.J., dissenting from the denial of rehearing en banc) ("Vermont's expenditure limits (and in my view, its contribution limits) are set so low and in such a fashion that *only* a desire to protect incumbents can explain them." (emphasis added)); Pet. App. 336a (Jacobs, J., dissenting from the denial of rehearing en banc) ("the dominant but impermissible effect of the Act is to protect incumbents").

Incumbents naturally possess formidable advantages over challengers. *See* Smith, *supra*, at 1075 n.158 ("Incumbency is already the single best predictor of electoral success."). As this Court noted in *Buckley*, "it is axiomatic that an incumbent usually begins the race with significant advantages." 424 U.S. at 31 n.33. If expenditures by challengers

can be limited to a level roughly equivalent to the average spent by all candidates, the advantages of incumbency become practically insurmountable. This is illustrated by the average amounts spent by winning candidates for national Congressional office in 2000 and 2002:

Average Spending By Winning Candidates - 2000[7]

	Senate	House
All	$7,506,743	$849,158
Challenger	$8,828,989	$2,024,725
Incumbent	$4,444,501	$782,460

Average Spending By Winning Candidates - 2002[8]

	Senate	House
All	$4,812,159	$898,184
Challenger	$6,826,395	$1,595,805
Incumbent	$4,681,870	$826,942

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[7] *See* OpenSecrets.org, The Big Picture, 2000 Cycle: The Price of Admission, *available at* http://www.opensecrets.org/bigpicture/stats.asp?cycle=2000 (last visited Nov. 17, 2005); OpenSecrets.org, The Big Picture, 2000 Cycle: Different Races, Different Costs, *available at* http://www.opensecrets.org/bigpicture/incad.asp?cycle=2000 (last visited Nov. 17, 2005).

[8] *See* OpenSecrets.org, The Big Picture, 2002 Cycle: The Price of Admission, *available at* http://www.opensecrets.org/bigpicture/stats.asp?cycle=2002 (last visited Nov. 17, 2005); OpenSecrets.org, The Big Picture, 2002 Cycle: Different Races, Different Costs, *available at* http://www.opensecrets.org/bigpicture/incad.asp?cycle=2002 (last visited Nov. 17, 2005). Although these figures from the 2000 and 2002 elections may be somewhat exaggerated by a few self-funding challengers with disproportionately high campaign expenditures, that cannot fully account for the significant difference between successful challengers' and successful incumbents' average expenditures. *See* OpenSecrets.org, The Big Picture, 2002 Cycle: Millionaire Candidates, *available at* http://www.opensecrets.org/bigpicture/millionaires.asp?cycle=2002.

In both election cycles and both Houses of Congress, the average amount spent by winning *challengers* was significantly more than the average amount spent by winning *incumbents* and, consequently, more than the average amount spent by all winning candidates. Clearly, if incumbents wish to insulate themselves from effective challenges, they merely need to ensure that challengers are limited to spending no more than the historical average. This is exactly what Act 64 accomplishes.

Moreover, as Judge Jacobs noted, "[t]he Act further benefits incumbents because the expenditure caps are the same whether or not a candidate faces a primary contest—which of course is more frequently a hurdle for challengers than for incumbents." Pet. App. 338a (Jacobs, J., dissenting from the denial of rehearing en banc). To challengers confronted with the nearly insurmountable advantages that Vermont's expenditure limits afford to incumbents—and to voters eager to be given a bona fide choice—the marginal 10-15% spending advantage offered by Act 64 provides little solace.

Act 64's exceptionally low contribution limits further serve to entrench incumbents because low contribution limits have their greatest impact upon challengers. Incumbents can rely on their name recognition, established donor lists, and free media. In contrast, challengers not only need more money overall, but they also usually rely on a small base of large donors until they become known by the voting public. Pet. App. 261a n.23. Act 64's expenditure and contribution limits hinder electoral challenges before they have a chance to gain momentum. *See Buckley*, 424 U.S. at 31 n.33 (noting that in some situations, "the overall effect of the contribution and expenditure limitations enacted by Congress could foreclose any fair opportunity of a successful challenge"). And without vigorously contested electoral races, voters cannot meaningfully exercise their right to participate in our republican form of government.

B. Expenditure Limits Reduce Political Accountability And Marginalize Ordinary Citizens.

The Second Circuit's opinion speaks repeatedly of "[e]vidence at trial [that] overwhelmingly demonstrated that the Vermont public is suspicious about the effect of big-money influence over politics." Pet. App. 129a. This "perception of corruption" is a persistent theme in Vermont's defense of Act 64. *See* Resp. & Part. Opp'n Pet. Writ Cert. at 7 ("All of this raises the specter of corruption and its appearance in the public's mind and causes citizens to lose trust in their government and their elected representatives.").

The argument fails on two levels. First, Vermont's contention that this concern demands governmental intervention inherently discounts the voting public's ability to address potential corruption through elections. Second, when coupled with contribution limits, expenditure limits actually increase the perception of so-called "big-money influence" on politics by drastically reducing the number of donors required to fund an election. If—as both the district court and Second Circuit suggested—the Vermont public is concerned that money buys influence, expenditure limits are likely to exacerbate such concerns. As the number of donors who contribute to a candidate decreases, the influence (or perceived influence) of any single donor increases.

The First Amendment empowers informed citizens—not elected officials—to decide whether to trust candidates and to vote accordingly. Vermont's assumption that it can restrict political speech in an effort to promote trust in elected officials runs directly counter to the principles of self-government embodied in the First Amendment. *See Buckley*, 424 U.S. at 57. Under Act 64, those candidates who are also elected officials decide how much their opponents are permitted to spend. Elections are usually fiercely competitive events, and—as with any competition—the competitor who

controls the rules has an enormous advantage over the other competitors.

Moreover, Act 64's expenditure limits rest on the premise that "public involvement decreases as spending increases." Pet. App. 278a (Winter, J., dissenting). This proposition is fundamentally flawed and belied by the fact that the most heavily contested elections often involve the most spending. Experience in Vermont bears this out. Record amounts were spent on Vermont's 2000 gubernatorial election in which several divisive issues were at stake; far from alienating voters, these expenditures actually captured voters' attention, resulting in 34.5% more people voting than in the prior gubernatorial election. Pet. App. 278a (Winter, J., dissenting).

Act 64's expenditure limits also ignore the *salutary* effects of fundraising activities. Indeed, fundraising events are not only a means of gathering contributions; they are also a mechanism through which candidates solicit votes and inform voters about their positions. Moreover, as this Court recognized in *Buckley*, "the financial resources available to a candidate's campaign, like the number of volunteers recruited, will normally vary with the size and intensity of the candidate's support." 424 U.S. at 56. Expenditure limits reduce the likelihood that the "size and intensity" of support for a particular candidate will be translated into political speech. Expenditure limits thus hurt those they are purportedly designed to protect—the voters. Government rationing of campaign spending inhibits voters' ability to perceive which ideas are widely held and resonate with a majority of the electorate.

In upholding the Act, the Second Circuit emphasized Vermont's belief that candidates tend to "expend[] more effort on relatively generous contributors over less important ones." Pet. App. 144a. Vermont assumes that expenditure limitations ensure "that candidates and officeholders will spend . . . more time interacting with voters." Pet. App. 127a

(alteration in original). In reality, expenditure limits actually encourage candidates and officeholders to spend *more* time interacting with *fewer* voters. If Act 64's assumption that money buys access is correct, the use of expenditure limits in conjunction with contribution limits actually increases the access and influence of "large" contributors ("large" meaning those capable of providing the maximum allowable contribution amount) at the expense of small contributors.

This result is attributable to the fact that the vast majority of campaign donors in Vermont historically have been "small" contributors. In the elections immediately preceding Act 64's passage, for example, between 82% and 96% of all contributions were below Act 64's limits. Pet. App. 39a-40a. In the aggregate, these "small" contributions likely represented a sizable portion of a candidate's total funds and therefore were valuable to the candidate, resulting in significant access for small contributors. With the imposition of expenditure limits, there are now more contributions available than a candidate can legally utilize. The most efficient way for a candidate to reach the fundraising limit is therefore to focus exclusively on comparatively "large" contributors. Thus, contrary to expectations, the combination of contribution and expenditure limits may actually eliminate the role of Vermont's small contributors and consolidate the influence of Vermont's largest campaign donors. There is accordingly a very real danger that large contributions "may eliminate the need for, and in that sense crowd out, smaller individual contributions." BREYER, *supra*, at 44.

Vermont also failed to consider that Act 64's particular combination of contribution and expenditure limits actually exacerbates the "specter of corruption" by radically reducing the number of contributors necessary or useful to any one candidate. Pet. App. 133a, 134a. Before Act 64, a candidate was likely to have many contributors, thereby spreading the candidate's funding among a broad group of donors. Act 64 inverts this tendency, consolidating the opportunity to con-

tribute (and, under Vermont's assumption, to influence) in the hands of a few. A candidate for state representative, for example, is likely to have as few as 10 contributors (10 contributors giving the $200 maximum contribution, which equals the $2,000 spending limit). Few candidates would opt to make hundreds of calls and attend dozens of public events if they could fully fund their campaign with 10 telephone calls. Act 64 therefore creates the very problem it was purportedly designed to resolve by "requir[ing] candidates to seek and rely on a smaller number of larger contributors . . . rather than a large number of small contributors." Pet. App. 131a (quoting 1997 Vt. Laws P.A. 64 (H.28) (finding No. 5)).

Moreover, because Act 64 sharply reduces the number of contributors, it exaggerates the potential for (and appearance of) corruption from each contribution. The more donors that contribute to a campaign, the less financial influence any one donor can have on that candidate. The public perception of improper influence from any one donor is also diminished when that donor is merely one of many. Before Act 64, a $200 donor may have been the source of only a small percentage of a Vermont state representative candidate's overall contributions and likely was one of many contributors. After Act 64, the same donor will be assured of having given 10% of the candidate's campaign funds and may be one of only ten contributors.

In Federalist 10, James Madison recognized what has become a famous solution to our young republic's problem of factions (*i.e.*, special interests). Rather than attempting to remove the "causes of faction," which Madison deemed impossible without destroying the liberty "essential to political life," Madison suggested that broadening the electoral base would keep any one interest from dominating. THE FEDERALIST NO. 10, at 72 (James Madison) (Clinton Rossiter rev. ed., 2003). This "republican remedy for the diseases most incident to republican government," *id.* at 79, reflects a

political understanding that is still celebrated in the "marketplace of ideas" conception of the First Amendment.

In the same way that our republic is moderated by competing political interests, competing monetary interests "encourag[e] the public participation and open discussion that the First Amendment itself presupposes" by "broaden[ing] the base of a candidate's meaningful financial support." *Shrink Mo. Gov't PAC*, 528 U.S. at 401 (Breyer, J., concurring). In the absence of expenditure limits, politicians are encouraged to reach out to more than a bare majority of their constituents and to avoid dismissing minority interests without careful consideration. Although a politician may need only 51% of the vote, fundraising considerations ensure that the interests of more than 51% of constituents will be considered. Politicians are encouraged to seek consensus solutions that satisfy more than a simple majority. Like Madison's solution to factions, the First Amendment's prohibition on expenditure limits ensures that elected officials are not concerned only with the interests of those who elected them.[9]

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[9] Act 64's presumption that spending by parties or PACs that benefits six or fewer candidates is a "related expenditure" similarly violates the First Amendment. The presumption discourages these organizations, which are now central to the political process, from engaging in independent political speech relating to a particular issue out of concern that the Act will automatically attribute the costs of their speech to a candidate. Similarly, these organizations will hesitate to speak in opposition to a candidate from fear that the cost of their speech will be automatically attributed to that candidate's opponent—or, at any rate, that the opponent will be put to the cost of demonstrating that it should not be so attributed, all against the backdrop of Act 64's very low expenditure limits. The First Amendment does not countenance such a chilling effect on political speech.

Even more perniciously, the combination of Act 64's coordinated-expenditure presumption and its expenditure limits could be used to effectively silence an opponent's campaign. A candidate's opponents could form PACs and use those PACs to run ads "supporting" the candidate on issues that have no importance to the electorate. Under Act 64's presump-

* * *

"Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218 (1966). At best, Act 64 illegitimately subordinates this core principle of self-government in a misguided attempt to ameliorate political inequalities. At worst, Act 64 is a bald-faced example of incumbent protectionism. Either way, it cannot survive First Amendment scrutiny.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit should be reversed.

Respectfully submitted.

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[Footnote continued from previous page]

tion, the cost of the PACs' ads would automatically count toward the candidate's expenditure limit. A candidate's permissible expenditures could thus be exhausted by his adversaries. The problem is made worse because expenses in challenging the presumption would also be attributed to the candidate's expenditure limit. Pet. App. 226a.

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IN THE
Supreme Court of the United States

NEIL RANDALL, *et al.*, *Petitioners*,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*.

WILLIAM H. SORRELL, *et al.*, and VERMONT PUBLIC INTEREST RESEARCH GROUP, *et al.*, *Cross-Petitioners*,
v.
NEIL RANDALL, *et al.*, and VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Cross-Respondents*.

On writ of certiorari to the United States Court of Appeals for the Second Circuit

Brief of Amicus Curiae ReclaimDemocracy.Org In Support of Respondents

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INTEREST OF AMICUS CURIAE

ReclaimDemocracy.org is a 501(c)(3) organization with a national membership that includes Vermont residents.[1] The organization works to build a genuinely representative democracy based on the principle that citizens' ability to influence elections and government should result from the quality of their ideas and their energy and effectiveness in promoting them, independent of their financial status.

ReclaimDemocracy.org works to ensure we do not decay from a democratic republic to plutocracy. In its view, the constitutional promise of equal protection of the laws for all citizens requires we separate the opportunity to influence elections from wealth. Moreover, it maintains that the wealth discrimination of the current system results in de facto race and (to a lesser extent) gender discrimination, so "purging wealth discrimination from the electoral system is ... a civil rights issue." ReclaimDemocracy.org's work would be severely undermined were this Court to determine that the First Amendment bars states from protecting their citizens and the democratic process itself by limiting the influence of wealth on elections.

ReclaimDemocracy.org asks the Court to affirm the right of the citizens of Vermont and their legislature to place reasonable limits on campaign investments and spending in order to further the purposes of the equal protection mandate of the Fourteenth Amendment.

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[1] Letters of consent have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Vermont statute at issue in this case regulates monetary contributions to political campaigns and the amount candidates spend in order to assure Vermont's elections reflect the will of its citizens and the persuasiveness of candidates rather than the influence of domestic and foreign wealth.

Were it not for *Buckley v. Valeo*, 424 U.S. 1 (1976), Vermont's action would raise no substantial Constitutional issue. *Buckley*, however, equated money with speech and thereby introduced First Amendment principles of governmental abstention into campaign finance jurisprudence. By this misclassification, *Buckley* revived laissez-faire doctrines barring the government from protecting its citizens from the power of wealth. Its *Lochner*esque imposition of "the Social Statics of Mr. Herbert Spencer," see, *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), creates an appearance of Constitutional conflict that has no basis.

Campaign contributions often are economic, marketplace transactions—purchases by individuals and business interests of "access" or "influence." Moreover, regardless of motivation, campaign contributions and candidate expenditures alike resemble economic activity far more than speech. Legislatures should be free to regulate them in order to protect our republican system of government from domination by wealth, just as they are free to create the rules for all other market transactions in order to harness the power of the market for the public good. *U.S. v. Carolene Products*, 304 U.S. 144, 153 (1938).[2] Free speech anti-

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[2] "Regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless ... it is of such a character as to preclude the assumption that it rests upon some rational basis ...." Id.

censorship principles which preserve individual liberty against overreaching power have precisely the opposite effect when extended to create special privileges for the wealthy to dominate the electoral system.

All democracies must separate the realms of two different decision-making processes. First, a political arena of equal citizenship and political democracy, characterized by the fundamental principle of one person, one vote, *Reynolds v. Sims*, 377 U.S. 533 (1964). Second, a market arena of individual decision and regulation by price, where the anti-discrimination principle of equal access to markets co-exists with necessarily unequal wealth and economic power. Indeed, the separation of the spheres of market and law is basic to the rule of law itself: Both the Fourteenth Amendment and fundamental principles of justice dating back at least to Leviticus 19:15 teach that the law should favor neither rich nor poor.[3]

In our dual system, we allow money to buy most things, but never the political system that determines the limits to what money can buy. See, e.g., *Gordon v. Lance*, 403 U.S. 1, fn 1 (1971) ("a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective").

Vermont's statute limiting the influence of money on elections is an attempt to embody these basic norms in its electoral system in order to prevent democracy from degenerating into plutocracy. It seeks to protect the autonomy of the citizenry of Vermont and to ensure equal access to the electoral process, regardless of wealth, that has long been fundamental to this Court's jurisprudence. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly

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[3] Cf. Exodus 23:6, Deuteronomy 1:17, 16:9.

prohibiting the free exercise of the franchise"); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional).

Moreover, like *Harper* itself, the Vermont statute recognizes that the wealth distribution in our country reflects racial divisions, so serious attempts to remedy racial wrongs also must confront the power of wealth. Each of these goals is presumptively valid under our Constitutional regime of republican democracy, and the legislature's choice of means is entitled to the usual deference granted to legislatively-enacted law.

Constitutional consideration of Vermont's attempt to protect its electoral system is distorted, however, by the lingering effects of *Buckley*. Neither Free Speech values, Equal Protection principles, nor the requirements of Due Process require that Vermont ignore the problems created for democracy when private wealth dominates the public electoral system.

The Court should take this opportunity to remedy the damage *Buckley* did to First Amendment, federalism and democratic values by rejecting this flawed precedent. Money is not speech. Applying doctrines designed to protect dissent and democracy to campaign finance has the perverse consequences of entrenching incumbents, unfairly enhancing the power of those individuals and corporations with the assets to purchase access to politicians, and, consequently, diminishing public faith in our institutions of government.

The Court should clarify that objections to the particular way Vermont has chosen to protect its republican form of government should be addressed to the people of Vermont and their elected representatives, not to this Court. Courts "are not free ... to reject [legislative] views about 'what constitutes wise economic or social policy,'" *Lyng v. UAW*, 485 U.S. 360 (1988).

ARGUMENT

I. *Buckley v. Valeo*'s Classification of Campaign Expenditures as First Amendment Speech Was Erroneous and Should Be Overruled

Buckley v. Valeo, 424 U.S. 1 (1976) revolutionized First Amendment and campaign finance law alike by holding that political money is "speech" for purposes of the First Amendment. Later cases have assumed the same analysis applies as against the state legislatures, via the Fourteenth Amendment's protections against violations of equal protection and due process of the laws.

But money is not speech. A regulatory regime appropriate to speech has perverse results when applied to money. After three decades of experience, the time has come to reexamine and reject *Buckley*.

First Amendment jurisprudence usually contains a strong presumption against governmental regulation, stemming from its core meaning as a ban on governmental censorship and governmental enforcement of religious and secular catechisms. *Buckley* transformed the traditional bar against censorship into something radically different: restrictive scrutiny of legislative action meant to protect the citizenry from abuse of the rights of property.

The First Amendment's protection against censorship is a critical element of our American system of republican self-government. First, the political freedom to criticize the incumbent officials is critical to majority rule: without it, government would be too free to manipulate, rather than respond to, public opinion. Open political debate is as foundational to democratic rule as elections. Second, we have long recognized free intellectual debate, cacophonous as it often is, as the only route to avoid the stagnation of vested

interests and to encourage intellectual progress. Third, the freedom to speak on all matters, even the purely artistic, creates a realm of privacy and personal freedom in which individuals can act without concern for the opinion of the majority, thus ensuring democracy does not degenerate into a tyranny of the majority.

Buckley, however, by simplistically substituting money for speech, promoted none of these values. Purchased speech often does not enhance political self-determination, truth-seeking intellectual inquiry or personal freedom.

A. *Buckley*, like *Lochner*, has privileged the privileged by sanctifying the current distribution of wealth

Buckley's equation of political money with speech repeats the infamous error of *Lochner*. In each case, the Court purported to derive an abstract principle from the Constitution's language. It then applied it without regard to context to cut off political debate over the difficult and controversial issue of how a democratic republic should manage its economy.

Lochner's invasion of the legislative sphere stemmed directly from its basic failing. The case assumed contractual agreements between bakers and their employers reflected the autonomous will of equal bargainers, and thus legislative imposition of terms was an invasion of the rights of both parties. This was a controversial view of contract then and remains one now. Others believed the very fact that bakers were willing to agree to work long hours in unsafe conditions was sufficient evidence that they had insufficient power to function as the autonomous beings the *Lochner* court imagined. *Lochner* was substantively wrong, first and foremost, because, by assuming equality when there was none, it further empowered the powerful at the expense of the weak. "Neutrally" enforcing agreements between bullies and their victims only worsens the position of the victims.

The *Buckley* framework suffers from a similar blindness to the realities of the world and a similar invasion of the legislative sphere with similar results: Reverse Robin Hood, it takes from the common person and gives to the rich. *Buckley* imposed a *Lochner*esque "free" market view on campaign regulation, in effect telling the people they and their elected representatives may not attempt to remedy the damage done to fair political competition by the distorting power of wealth. Like *Lochner*, *Buckley* wrongly interpreted the Constitution to protect a particular understanding of the rights of property, but not to protect more important rights—the true values of the First Amendment—from being subordinated to economic power.

Buckley mimicked *Lochner* in a third way. It made a major contribution to a political/economic complex that simply does not work on the ground, regardless of whether its particular conceptualization of the law can be made internally consistent. *Buckley* underpins the corruption and collapse of American politics much as *Lochner* helped lead to the collapse of our economy. The Great Depression demonstrated for many Americans that a market economy can succeed only if it involves and benefits a wide spectrum of citizens. *Buckley*'s imposition of *Lochner*esque "free markets" on elections has, similarly, led to the exclusion of most Americans from participation in and the benefits of democratic politics. This damages the legitimacy of and destabilizes our republican form of government. We should not wait for a political equivalent to the Great Depression before reversing course.

B. Property rights and the limits placed on the use of wealth to buy influence are matters of state law, not the First Amendment

The question of how best to define the rights of property and finance elections so as to protect citizens'

political rights and republican self-government is difficult and controversial. Many Americans today believe our representative democracy needs urgent repair. Campaign finance reform lies at the controversial core of that struggle precisely because it reflects multiple conflicting constitutional values.

Elections rely on the principles of "one person, one vote" and equal access to the ballot for their legitimacy. Similarly, the American conception of a republican form of government by "we the people" demands all citizens enjoy the equal protection of the laws and equal political rights regardless of wealth. See, e.g., *Harper*, 383 U.S. 663 (1966) (invalidating poll tax); *Bullock v. Carter*, 405 U.S. 134, 135 (1972) (invalidating ballot-access fees); *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating ballot-access fee). The rights and responsibilities of citizenship, like the law and its protection, cannot be for sale.

Our market-based economy has inherent tendencies to inequality and to expanding the range of items that can be bought and sold. Determining and maintaining the boundary between the realms of market and politics is a central political question in our society. How much should the legal system counterbalance market tendencies to give more to those who already have more? When should the legal system modify the rules creating the market system to price goods—such as security, social stability, or clean air—that other market-based legal rules might not? What things or rights ought not to be for sale at all?

Campaign finance reform is at the core of the great debate over the proper place of the market in a democratic republic. Under our Constitutional system, government cannot be for sale, nor can politics be reduced to a marketplace. But even equal access to the ballot "does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *McConnell*